(1)

Supreme Court, U.S.
FILED

No. _____ 98 294 MAY 11 1998

_____ OFFICE OF THE CLERK

IN THE
SUPREME COURT COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DUANE FLESCH - PETITIONER

VS.

CHARLES WRANOSKY - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO WISCONSIN COURT OF APPEALS

DUANE FLESCH, PRO SE
ROUTE 1, BOX 278
NIAGARA, WISCONSIN 54151
(715) 251-4154

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can the Wisconsin Supreme Court deny petitioner's right to petition for review on the basis of a delay caused by an unexpected death, which is an act of God wholly beyond petitioner's control?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appear at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was February 5, 1998, and a copy of the order appears at Appendix B, p 9.

A timely motion for reconsideration was thereafter denied on February 13, 1998, and a copy of the order denying reconsideration appears at Appendix C, at p 10.

A jurisdiction of this Court is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right to access to the courts based on the First and Fourteenth Amendment right to petition.

LIST OF PARTIES

All parties in the case appear on the cover page.

STATEMENT OF THE CASE

The Wisconsin Supreme Court denied Petitioner's Motion For An Extension of Time to file a petition for review, even though the delay was caused by an unexpected death. The explanation for the denial is the fact that after the

30-day period: "There is no authority to extend the time in which to file a petition for review." **First Wis Nat Bank of Madison v Nicholaouo,** 87 Wis 2d 360, 274 NW2d 704 (1979); (Order, Appendix B, at p 9).

The circumstances under which this occurred are these: (1) Petitioner is pro se and is severely handicapped with deformed hands, and cannot type; (2) Petitioner had 30 days to learn the rules, compile his petition, and submit it to be typed, copied and filed by January 30, 1998; (3) Petitioner submitted it for typing and copying on January 26, to be completed and ready for mailing by January 28, at 4:30 p.m.; (Flesch Affidavit, ¶¶ 2, 3, 6, Appendix H, p 16, 17; and Hommrich Affidavit, ¶¶ 2, 3, Appendix F, p13).

(4) On January 28, at 11:45 a.m., while typing the petition, the typist's mother died unexpectedly (Hommrich Affidavit, ¶ 4, Appendix F, p 13, and Death Certificate, Appendix G p 15); (5) the typist could not finish typing the petition on time (Hommrich Affidavit, ¶ 5, Appendix, F, p 13-14; and Flesch Affidavit, ¶ 5, pp 16-17).

(6) On January 29, Petitioner called the Clerk of Appeals Court to explain; (7) on February 3, Petitioner filed a motion for an extension of time to file the petition (Motion, Appendix D, p 12; (8) On February 5, the motion was denied (Order, Appendix B, p 9).

(9) On February 12, Petitioner filed a motion for reconsideration, with affidavits and proof of the circumstances and death (Motion for Reconsideration, Appendix E, p 12; Flesch Affidavit, Appendix H, p 16; Hommrich Affidavit, Appendix F, p 13; Death Certificate, Appendix G, p 15); (10) On February 13, 1998, the Motion was denied (Second Order, Appendix D, p 10).

REASONS FOR GRANTING THE WRIT

The Wisconsin supreme Court's harsh interpretation of the Wisconsin statute unfairly penalizes petitioner for an act of God. Petitioner has found no cases interpreting the time limitations this way. Early cases in this Court make clear that courts have the power to waive the time requirement under appropriate circumstances. See, e.g., **Grigsby v Purcell, 99 US 505, 506-507, 25 L Ed 354, 355 (1879); Richardson v Green, 130 US 104, 111, 32 L Ed 872, 874, 9 S Ct 443 (1889); Green v Elbert, 137 US 615, 621-623, 34 L Ed 792, 795, 11 S Ct (188) (1891).**

This Court has granted certiorari and decided civil cases that were filed after the 90-day period, without any mention of the time question. See, e.g., **Pierson v Ray, 386 US 547, 18 L Ed 2 d 288, 87 S Ct 1213 (1967).** And has held under circumstance less compelling than here, that statutory provisions did not eliminate power to hear appeals docketed after the time limit. See, **United Public Workers v Mitchell, 330 US 75, 86, 91 L Ed 754, 765, 67 S Ct 556 (1947).**

Cases deciding timeliness to the court of appeals have reached the same result without including any reference to a judicial rule-making power on the subject. See e.g., **Georgia Lumber Co v Compania, (1945) 323 US 334, 89 L Ed 280, 65 S Ct 293; R F C v Prudence Group, 311 US 579, 85 L Ed 364, 61 S Ct 331 (1941).**

These cases show that such a harsh interpretation of the Wisconsin statute is not supported by case law. Although the statutory language referred to may not say that the time limits may be inapplicable under certain conditions, it also does not say that they must be ruthlessly applied without regard to the circumstances presented here.

If the Wisconsin Court is correct, "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted." **R F C, id, 311 US, at 582, 85 L Ed at 367.**

CONCLUSION

Petitioner respectfully asks this Court to decide that the Wisconsin Supreme Court made an unfair interpretation of the statute in light of circumstances in this case and for the reasons stated above that the petition for a writ of certiorari should be granted.

Dated this July 27th, 1998.

"s/Duane Flesch, Pro se"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1997
Marilyn L. GRAVES
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

The party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-0594
STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DUANE FLESCH,

PLAINTIFF-APPELLANT,

V.

CHARLES WRANOSKY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Duane Flesch appeals a summary judgement dismissing his action against Charles Wranosky and finding the action frivolous. Wranosky requests that this court find the appeal frivolous. We conclude that the trial court properly granted summary judgment but that the appeal is not frivolous.

Flesch's complaint alleged numerous causes of

action, some of which are not pursued on appeal. His brief also requests review of several interlocutory orders but does not make specific argument regarding those orders. We deem those issues abandoned as well. *See* ***Reiman Assocs. v. R/A Advert.,*** 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). Other issues are argued for the first time in the reply brief. We will not decide those issues. *See* ***Schaeffer v State Personnel Comm'n,*** 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). The dispositive issues are whether Wranosky's supporting papers were properly considered by the trial court and whether the court properly granted summary judgment dismissing Flesch's defamation, malicious prosecution and conversion claims.

The trial court properly considered Wranosky's supporting papers. Flesch cites statutes and cases that were superseded many years ago to support his argument that Wranosky's supporting papers did not meet statutory requirements. He also argues that the affidavits should not be considered because they conflicted with affidavits presented in another action. We conclude that the trial court properly considered the affidavits under the current statutes. In addition, the affidavits provide almost no factual material upon which the summary judgment depends. Each of Flesch's claims fails for more than one reason. While the challenges to Wranosky's supporting papers might take a difference as to some of the grounds for dismissal, the claims pursued on appeal were properly dismissed without resorting to the facts presented by the affidavits. Facts alleged in Flesch's complaint, his own supporting papers and documents that are subject to judicial notice provide an adequate basis for dismissing each of the claims pursued on appeal.

The defamation claim was properly dismissed because the statute of limitations expired. Flesch contends that Wranosky defamed him by making false accusations suggesting that Flesch stole a chain saw and a gun from a home owned by Flesch's uncle, George Vlach. The complaint alleges that Wranosky made defamatory statements to the police, courts, attorneys, district attorneys, judges, jury members and numerous other parties. These allegedly defamatory statements were made in Flesch's presence or were made known to him more than two years before he commenced this action. Therefore, the claims are barred by §893.57, STATS.

The malicious prosecution claim was properly dismissed because there was probable cause for the prosecution. Lack of probable cause is an essential element of an action for malicious prosecution. *See* ***Krieg v Dayton-Hudson Corp.,*** 104 Wis.2d 455, 461, 311 N.W. 2d 641, 642 (1981). Flesch was convicted by a jury of burglarizing Vlach's home. The trial court later vacated the judgement of conviction due to some unknown error in the trial. A conviction, even though reversed on appeal, is presumptive evidence of the existence of probable cause in a subsequent malicious prosecution action. ***Id.***

The conversion claim was properly dismissed because the undisputed facts contradict Flesch's complaint in which he alleged that he permanently lost ownership of a rifle. Flesch now concedes that the rifle was returned to him by Vlach's heirs who received the rifle from Wranosky after the criminal trial concluded. As a convicted felon, Flesch was not entitled to possession of the rifle until his conviction was vacated. Flesch does not allege that Wranosky or the heirs refused any demand for return of the rifle. In addition,

Flesch identifies no specific damages that he incurred as a result of his temporary loss of control over the rifle.

Although we uphold the trial court's dismissal of Flesch's action and its finding that the action was frivolous, [1] we decline to hold the appeal frivolous. Ordinarily, an appeal from a judgment finding an action frivolous will also result in a frivolous appeal because the appellant is put on notice by the trial court's decision that his arguments are untenable. In this case, however, the trial court's decision does not directly address all of the arguments Flesch makes on appeal and, particularly, the grounds that we conclude are dispositive. Flesch's brief raises numerous issues of fact that relate to Wranosky's malice and intent. We conclude that these issues are immaterial because Flesch's claims were properly dismissed regardless of Wranosky's malice or intent. Nonetheless, we cannot conclude that the brief as a whole raises issues that Flesch knew or should have known were non meritorious.

By the Court - Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1(b)5, STATS.

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[1] Whether the action before the trial court was frivolous is one of the issues not properly raised on appeal.

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SUPREME COURT
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FACSIMILE (608) 267-0640

To:

February 25, 1998

Hon. James B. Mohr
Vilas County Circuit Court
P.O. Box 171
Eagle River, WI 54521

John W. Saari, Jr.
Rodd, Mouw & Saari, S.C.
P.O. Box 757
Rhinelander, WI 54501

Duane Flesch
Route 1, Box 278
Niagara, WI 54151

You are hereby notified that the Court has entered the following order:

No. 97-0594 Flesch v. Wranosky L.C.#95CV215

Plaintiff-appellant, Duane Flesch, having filed a motion to extend the time in which to file a petition for review;

IT IS ORDERED that the motion is dismissed. There is no authority to extend the time in which to file a petition for review. First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis. 2d 360 N.W.2d 704 (1979). The motion itself cannot be liberally construed as a timely-filed petition for review since

it was filed beyond the 30-day limit.

Marilyn L. Graves
Clerk of Supreme Court
Office of the Clerk

SUPREME COURT
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE (608) 266-1880
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To.

February 13, 1998

Hon. James B. Mohr
Vilas County Circuit Court
P.O. Box 171
Eagle River, WI 54521-0171

John W. Saari, Jr.
Rodd, Mouw & Saari, S.C.
P.O. Box 757
Rhinelander, WI 54501-0757

Duane Flesch
Route 1, Box 278
Niagara, WI 54151

You are hereby notified that the court has entered the following order:

No. 97-0594 Flesch v. Wranosky L.C.#95CV215

Plaintiff-appellant, Duane Flesch, having filed a motion for reconsideration;

IT IS ORDERED that the motion is denied. As Flesch was previously informed, there is no authority to extend the time in which to file a petition for review.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS OF WISCONSIN - DISTRICT III

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

MOTION FOR 2 WEEK EXTENSION

DUANE FLESCH, APPELLANT, moves the court, pursuant to §§ 809.14 (1) AND 809.82 (2), for a 2 week extension to file a petition for review for the following reasons:

1. Appellant's petition was due on January 20, 1998.
2. Appellant is Pro se, and is handicapped with deformed hands and is unable to type and make copies.
3. Appellant submitted his petition to Evelyn Hommrich for typing and copying on January 26, 1998.
4. Evelyn Hommrich's mother died on January 28, 1998.
5. Evelyn Hommrich was therefore unable to complete the typing and copying of the petition.

WHEREFORE, Appellant requests an order granting a two week extension to file his petition for review.

February 3, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. MOTION FOR RECONSIDERATION OF MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

MOTION FOR RECONSIDERATION OF MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

DUANE FLESCH, APPELLANT, moves the court, for reconsideration of petitioners' motion, filed pursuant to §§ 809.14 (1) and 809.82 (2), for a 2 week extension to file a petition for review, based on this motion and the attached affidavits of Evelyn Hommrich and petitioner which attest to the following facts as grounds for the previous motion and this present motion:

1. Appellant's petition was due on January 30, 1998.

2. Appellant is Pro se, and is handicapped with deformed hands and is unable to type and make copies (See Flesh aff, EX D).

3. Appellant submitted his petition to Evelyn Hommrich for typing and copying on January 26, 1998 (See Hom and Flesch aff, EXS C and D).

4. Evelyn Hommrich's mother died unexpectedly on January 28, 1998 (See Hom aff EX C, and att death cert.).

5. Evelyn Hommrich was therefore unable to complete the typing and copying of the petition. (See Hom Aff, EX C).

WHEREFORE, Appellant requests an order allowing petitioner to file his petition for review with the Supreme Court.

February 12th, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. HOMMRICH AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

HOMMRICH AFFIDAVIT
IN SUPPORT OF MOTION FOR RECONSIDERATION

STATE OF WISCONSIN }
} ss.
COUNTY OF MARINETTE }

EVELYN HOMMRICH, being duly sworn, deposes and says, based on personal knowledge:

1. I am submitting this affidavit for use in support of a motion for reconsideration filed on behalf of Duane Flesch in the Wisconsin Supreme Court in the above-titled action.

2. On January 26, 1998, Duane Flesch requested that I type and make copies of his Petition for Review to the Wisconsin Supreme Court.

3. The paperwork was to be completed for mailing to the court by 4:30 p.m., on January 28, 1998.

4. On January 28, 1998, at 11:45 a.m., I went to my mother's home and found my mother had died unexpectedly (See att Death Certificate Mildred Joyce Pringle).

5. Because of my grief and having to respond to the tasks that arose from this unexpected crisis, I was unable to complete the task of typing and copying the Flesch Petition in time for Flesch to meet his deadline.

6. The delay on filing the action was not caused by any neglect on the part of Flesch.

7. I have completed the typing of the petition and can submit the copies if Flesch's motion is granted.

February 12th, 1998.

"s/Evelyn Hommrich"
989 Main Street, #1
Niagara, WI 54151
(715) 251-1171

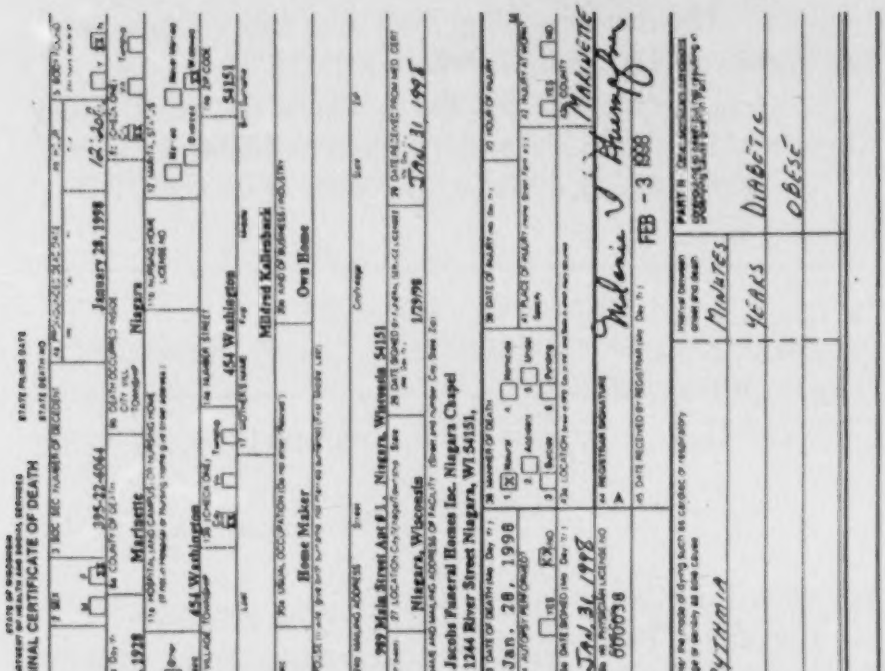
Subscribed and Sworn by me
this 12th day of February, 1998.
"s/Victoria E. Nault"
Notary Public
My Commission Expires: 2/4/01
County of Marinette
State of Wisconsin

MARINETTE COUNTY REGISTER OF DEEDS

I hereby certify that this is a true and correct reproduction of the record filed in the office of the Marinette County Register of Deeds.

Date: February 3, 1998

"s/Melanie I. Huempfner"
Register of Deeds



APPENDIX G

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. FLESCH AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

FLESCH AFFIDAVIT
IN SUPPORT OF MOTION FOR RECONSIDERATION

STATE OF WISCONSIN }
COUNTY OF MARINETTE } ss.

DUANE FLESCH, being duly sworn, deposes and says, based on personal knowledge:

1. I am submitting this affidavit for use in support of a motion for reconsideration filed on behalf of myself, Duane Flesch, in the Wisconsin Supreme Court in the above-titled action.

2. On January 26, 1998, I requested that Evelyn Hommrich type and make copies of my Petition for Review to the Wisconsin Supreme Court.

3. The paperwork was to be completed for mailing to the court by 4:30 p.m., on January 28, 1998.

4. On January 28, 1998, Evelyn Hommrich's mother died unexpectedly (See Hom aff, EX C, with Att Death

Certificate of Mildred Joyce Pringle).

5. Because of her grief and having to respond to the tasks that arose from this unexpected death, Evelyn Hommrich was unable to complete the typing and copying of my Petition in time to meet the filing deadline.

6. I am handicapped and my hands are deformed and I am unable to type and make copies and therefore, the delay in filing the petition was not caused by any neglect on my part.

7. On February 3, 1998, I mailed a motion for a 2 week extension to file the petition and on February 5, 1998, the motion was denied (att as EXS A and B are true and correct copies of the Motion and the Order).

8. I believe the circumstances warrant my being permitted to file my petition.

9. The petition is typed and if my motion is granted I will submit the copies immediately.

February 12, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

Subscribed and Sworn by me
this 12th day of February, 1998.
"s/Victoria E. Nault"
Notary Public
My Commission Expires: 2/4/01
County of Marinette
State of Wisconsin

Supreme Court, U.S.
FILED
SEP 4 1998
CLERK

No. 98-294

In The

Supreme Court of the United States

October Term, 1997

DUANE FLESCH,

Petitioner,

vs.

CHARLES WRANOSKY,

Respondent.

On Petition For Writ Of Certiorari To Wisconsin Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. PETITIONER'S STATEMENT OF THE CASE VIOLATES THE REQUIREMENTS OF SUPREME COURT RULE 14.1(g)(i).

Petitioner's statement of the case fails to include any specification of the raising of a federal question in the court below, as required by Rule 14.1(g)(i). As pointed out below, this omission from petitioner's statement of the case was necessary, because no federal question was raised or passed upon in the courts below. Therefore, Rule 10 (considerations governing review on certiorari), does not allow this Court to grant petitioner's writ.

First, this is not a case emanating from a United States Court of Appeals. Secondly, the state court of last resort has not decided any federal question. Thirdly, the state court has not decided any federal question that should be settled by this Court, because no federal question was raised or passed upon in the court below.

Therefore, merely as a matter of the application of this Court's rules, petitioner's writ should be denied.

II. NO FEDERAL QUESTION WAS "PRESSED OR PASSED UPON BELOW".

The petitioner's argument and appendix conclusively reveal that petitioner failed to raise any federal question whatsoever in the court below, and that the Wisconsin Supreme Court refused to accept petitioner's petition for review in that court due to state procedural grounds. Thus, no federal question was raised or passed upon by that court.

This Court's earlier decisions held that, in cases such as the instant one, this Court lacked jurisdiction to consider the question presented. *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969). See also *Webb v. Webb*, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981), where the Court held,

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

451 U.S. 493, 496-497.

More recently, this Court has expressed some doubt as to whether this rule is one invoking the jurisdiction of this Court, or whether this Court, having jurisdiction, would find the acceptance of such a case to be imprudent. See *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), setting forth the decisions creating the conceptual dichotomy in prior decisions of this Court.

The *Gates* Court likewise examined the reasons underlying the "not pressed nor passed upon" rule. As that Court held, the first reason is that questions not raised below are likely to have an inadequate record upon which this Court can base a ruling. In the instant case, obviously, there is no record of any federal question upon which this Court can base a ruling.

Secondly, state courts, as a matter of comity, should be given an opportunity to consider the constitutionality of their own statutes, rules and the actions of their officials.

Third, the Court recognized that the state court may, if allowed, rest its decision on an adequate and independent state ground.

Respondent suggests that, whether this Court considers the "not pressed nor passed upon below" rule to be jurisdictional or prudential, the instant case falls squarely within the reasons why this Court should refuse to review this decision. All of the reasons set forth in *Gates* apply here.

In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988), this Court declined to address the appellant's challenges to the size of the punitive damages award in that case, even though the appellant had attempted to raise the issue in the court below, because this Court found that the appellant's vague and general appeal to constitutional principles was insufficient to adequately raise the question. In the instant case, petitioner has totally failed to raise the question, and the court below has not, therefore, passed upon it.

Yee v. City of Escondido, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992), is in accord with *Gates* and *Crenshaw*. The *Yee* Court, while not deciding that the rule was jurisdictional or prudential, held that,

> Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

503 U.S. 519, 533. Respondent suggests that, for all the reasons set forth in the above-cited cases, the same conclusion should apply to the instant case.

III. THE WISCONSIN SUPREME COURT REFUSED TO ACCEPT PETITIONER'S PETITION FOR REVIEW IN THAT COURT BECAUSE OF A NEUTRAL STATE RULE REGARDING THE ADMINISTRATION OF ITS COURTS.

First, respondent points out that this is not a case such as *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983), where the state court considered both federal and state questions in its decision, and the controversy is whether or not the state court's decision rested on independent and adequate state grounds. As pointed out above, because no federal question was ever presented to the state court, the state court's decision rests solely on state grounds. However,

> The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.

Caldwell v. Mississippi, 472 U.S. 320, 327, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). In the instant case, however, it is clear that the Wisconsin Supreme Court rested its decision on independent and adequate state grounds.

Wisconsin Supreme Court Rule 809.62(1), sets forth, in relevant part, as follows:

> A party may file with the supreme court a petition for review of an adverse decision of the

> Court of Appeals pursuant to Sec. 808.10 within 30 days of the date of the decision of the Court of Appeals. Supreme Court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented.

Wisconsin Supreme Court Rule 809.62(1) is based upon a statutory provision, Sec. 808.10, Wis. Stats. That section provides as follows:

> A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

The foregoing statute and rule clearly apply to all litigants before the Wisconsin Supreme Court. As such, they constitute a neutral state rule regarding the administration of its courts. *Howlett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990). The *Howlett* case involved the refusal of the Florida state courts to accept a claim brought under 42 U.S.C. Section 1983 in state court. This Court held, in *Howlett*, that Florida was not at liberty to refuse to entertain such suits, under the Supremacy Clause of the United States Constitution. The instant case, however, involves no refusal on the part of Wisconsin to entertain a federal cause of action, because no federal claim was ever raised before the Wisconsin courts.

The Wisconsin Supreme Court's rule requiring petitions for review to be filed within 30 days of the date of the decision of the Court of Appeals deprives the Supreme Court of subject matter jurisdiction.

> We hold that failure to comply [with the 30-day time limit] deprives this court of subject matter jurisdiction. The objection is not subject to waiver, and will be raised by this court *sua sponte*.

First Wisconsin National Bank of Madison v. Nicholaou, 87 Wis.2d 360, 364, 274 N.W. 2d 704, 706 (1979).

Further,

> It has always been recognized that the timely filing of a petition for review is necessary to invoke this court's appellate jurisdiction. *See* First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis.2d 360, 274 N.W. 2d 704 (1979). To be timely, a petition for review must be filed within 30 days of the date of the decision of the court of appeals; that 30-day filing deadline is specified by the legislature, sec. 808.10, Stats., and by this court's own rule, sec. (Rule) 809.62(1).

St. John's Home of Milwaukee v. Continental Casualty Co., 150 Wis.2d 37, 42, 441 N.W. 2d 219, 221 (1989).

Therefore, the Wisconsin Supreme Court lacked subject matter jurisdiction to entertain petitioner's petition to review in that court, pursuant to a neutral state rule regarding the administration of its courts.

Furthermore, petitioner had no right to have his case reviewed by the Wisconsin Supreme Court. Had that court accepted his petition, it would certainly have denied it. As the decision of the Court of Appeals, set forth at Appendix A, pages 5 through 8 of petitioner's petition reveals, not only were all of the issues properly raised by petitioner in that appeal properly dismissed for more than one reason, the Court of Appeals affirmed the

trial court's holding that petitioner's case was frivolous. The Wisconsin Supreme Court, under those circumstances, would hardly have granted petitioner's petition in that court.

CONCLUSION

Petitioner's statement of the case fails to comply with Supreme Court Rule 14.1(g)(i), for the reason that no federal question was either raised or passed upon below. The case was decided by the court below on an independent and adequate state ground, a neutral procedural rule regarding the administration of the Wisconsin state court system. This Court should, therefore, deny petitioner's petition for writ of certiorari.

Dated this 4th day of September, 1998.

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